

**IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA**

**BREN J. POMPONIO,**

**Plaintiff,**

**v.**

**Civil Action No. 19-C-\_\_\_\_\_  
Honorable \_\_\_\_\_, Judge**

**WEST VIRGINIA DEPARTMENT  
OF COMMERCE,**

**Defendant.**

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF PURSUANT TO  
THE WEST VIRGINIA FREEDOM OF INFORMATION ACT**

Comes now the Plaintiff, Bren J. Pomponio, and submits his *Complaint for Declaratory and Injunctive Relief Pursuant to the West Virginia Freedom of Information Act* against the Defendant, West Virginia Department of Commerce.

**THE PARTIES**

1. Plaintiff Bren J. Pomponio (“Plaintiff”) is an attorney and co-director of Mountain State Justice, Inc. - a non-profit organization that, according to its website, provides “legal advocacy on behalf of low-income West Virginians to ensure access to the civil justice system for the vindication and protection of their rights.”
2. Defendant West Virginia Department of Commerce (sometimes “WVDOC”) is a public body as defined by W. Va. Code § 29B-1-2 (4), and the possessor of the documents and information sought by the Plaintiff under the West Virginia Freedom of Information Act, W. Va. Code § 29B-1-1 *et seq.* (sometimes “WVFOIA”).

## **JURISDICTION AND VENUE**

3. This is an action brought pursuant to the WVFOIA seeking disclosure of public information and records, and this Court has jurisdiction over this action pursuant to W. Va. Code § 29B-1-5.

4. Venue is appropriate before this Court because, the public records requested by the Plaintiff are believed to be kept by the WVDOC in Kanawha County, West Virginia.

## **THE FACTS**

5. The WVDOC is the West Virginia state agency and/or West Virginia state executive department responsible for the administration of the RISE West Virginia program (sometimes, “RISE”).

6. After the disastrous flood of June 2016, RISE received nearly \$150 million from the U.S. Department of Housing and Urban Development (“HUD”) to repair and reconstruct single-family homes and rental properties that sustained heavy damage. The RISE funds were obtained from a federal Community Development Block Grant designated specifically for disaster relief.

7. The RISE funds were to be made available to approved applicants in the West Virginia counties most severely affected by the June 2016 flood.

8. Upon receipt of these federal funds, bureaucratic and administrative problems immediately plagued the RISE program.

9. For example, in March of 2017, the WVDOC initially negotiated a \$900,000 contract with Horne LLP - a Mississippi company that provides states with assistance in responding to natural disasters. This contract covered only a portion of the considerable work required in the rebuilding and reconstruction effort in West Virginia.

10. However, a WVDOC employee later changed and signed the contract raising the cost to \$17

million for the services of Horne LLP.

11. Both the West Virginia Purchasing Division and West Virginia Attorney General were required to approve this significant change to the contract. But this did not occur.

12. The contract also contained an unexplained discrepancy, in that it was dated and indicated as effective on December 12, 2016. However, an agent of the State of West Virginia did not sign the contract until March 30, 2017.

13. These and other factors led the Governor of West Virginia to suspend all activity under the RISE program, causing significant delay to recovery and rebuilding efforts.

15. More specifically, the State did not receive authorization from HUD to spend any RISE funds until February 20, 2018.

16. Several individuals - including, without limitation, approved recipients of RISE funds - indicated that they frequently received inconsistent and inaccurate representations from WVDOC officials as to the RISE program's status, as well as insufficient explanations as to why assistance had not been received.

17. In a news release of November 2017, the Secretary of the WVDOC claimed that 1,100 families had received assistance from the RISE program. However, the Governor of West Virginia later characterized this claim as "entirely inaccurate."

18. On March 19, 2018, the Plaintiff submitted a FOIA request seeking the following information: "Under the West Virginia Freedom of Information Act, W. Va. Code § 29B-1-1 et seq., I am requesting an opportunity inspect or obtain copies of public records that describe all monies received and expended by RISE WV and (2) staffing in connection with the 2016 disaster relief programs for replacement housing, and (3) guidelines and regulations; in connection with the

construction program.” See **Exhibit 1** (“03/19/18 FOIA request”).

19. In his 03/19/18 FOIA request, Plaintiff further indicated as follows: “The West Virginia Freedom of Information Act requires a response to this request be made within five business days. If access to the records I am requesting will take longer than this amount of time, please contact me with information about when I might expect copies or the ability to inspect the requested records.” *Id.*

20. “If you deny any or all of this request, please cite to each specific exemption you feel justifies the refusal to release the information and notify me of the appeal procedures available to me under the law. Thank you for considering my request. If you have any questions, please feel free to call me.” *Id.*

21. Plaintiff’s 03/19/18 FOIA request complied with all of the procedural and content requirements of the WVFOIA, and was properly addressed and sent to the Custodian of Records of the West Virginia Department of Commerce.

22. However, the WVDOC did not respond to Plaintiff’s 03/19/18 FOIA request within five days, as required by law.

23. The WVDOC did not contact the Plaintiff and inform him that a response to his request would require more than five days. Nor did it inform him when he could expect to receive a response.

24. The WVDOC did not inform the Plaintiff that his 03/19/18 FOIA Request was denied. Nor did it cite to any exemptions justifying the refusal to release the requested information or notify the Plaintiff of any available appeal procedures.

25. Instead, the WVDOC did not respond in any manner to the Plaintiff’s 03/19/18 FOIA request,

and did not contact him at all.

26. Accordingly, the Plaintiff submitted a second a FOIA request to WVDOC on November 8, 2018. *See Exhibit 2* (“11/08/18 FOIA request”).

27. The Plaintiff’s 11/08/18 FOIA request contained the same request for information as his 03/19/18 FOIA Request , and the content of the 11/08/18 FOIA request was the same as his previous FOIA request.

28. However, the WVDOC yet again did not respond to the Plaintiff’s 11/08/18 FOIA request. Nor did the WVDOC contact the Plaintiff in any manner.

### **LEGAL AUTHORITY AND DISCUSSION**

29. The WVFOIA recognizes that “[p]ursuant to the fundamental philosophy of the American constitutional form of representative government which holds to the principle that government is the servant of the people, and not the master of them, it is hereby declared to be the public policy of the state of West Virginia that all persons are, unless otherwise expressly provided by law, entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees.” W. Va. Code § 29B-1-1.

30. “To that end, the provisions of this article shall be liberally construed with the view of carrying out the above declaration of public policy.” *Id.*

31. “Every person has a right to inspect or copy any public record of a public body in this state [.]” W. Va. Code § 29B-1-3 (a).

32. In the present case, the Plaintiff requested public records pursuant to the following definition provided in the WVFOIA: “Public record includes any writing containing information prepared or received by a public body, the content or context of which, judged either by content or context,

relates to the conduct of the public's business." W. Va. Code § 29B-1-2 (5).

33. "A request to inspect or copy any public record of a public body shall be made directly to the custodian of such public record." W. Va. Code § 29B-1-3 (b).

34. The Plaintiff made a direct request to the custodian of records of the WVDOC to inspect and/or copy public records.

35. "The custodian of any public records, unless otherwise expressly provided by statute, shall furnish proper and reasonable opportunities for inspection and examination of the records in his or her office and reasonable facilities for making memoranda or abstracts therefrom, during the usual business hours, to all persons having occasion to make examination of them." W. Va. Code § 29B-1-3 (c).

36. The Plaintiff specifically requested that the custodian of public records for the WVDOC comply with this requirement of the WVFOIA. The WVDOC custodian of public records did not comply, and did not provide any explanation for noncompliance.

37. "All requests for information must state with reasonable specificity the information sought." W. Va. Code § 29B-1-3 (d).

38. The Plaintiff complied with this reasonable specificity requirement in both of his FOIA requests, as demonstrated above in paragraph 18 and in Exhibits 1 and 2.

39. "The custodian, upon demand for records made under this statute, shall as soon as is practicable but within a maximum of five days not including Saturdays, Sundays or legal holidays: (1) Furnish copies of the requested information; (2) Advise the person making the request of the time and place at which he or she may inspect and copy the materials; or (3) Deny the request stating in

writing the reasons for such denial. A denial shall indicate that the responsibility of the custodian of any public records or public body to produce the requested records or documents is at an end, and shall afford the person requesting them the opportunity to institute proceedings for injunctive or declaratory relief in the circuit court in the county where the public record is kept.” W. Va. Code § 29B-1-3 (d).

40. The WVDOC did not comply with any of the legal obligations established in W. Va. Code § 29B-1-3 (d). With regard to the information requested, it did not within the maximum of five days: (1) furnish copies; (2) advise the Plaintiff when and where he could inspect and copy; or (3) deny the request and include in writing the requisite content and notifications.

41. “There is a presumption of public accessibility to all public records, subject only to the following categories of information which are specifically exempt from disclosure under this article[.]” W. Va. Code § 29B-1-4 (a).

42. This section of the WVFOIA goes on to list a number of specific exemptions that a public body must demonstrate to overcome the presumption of public access to information. The WVDOC did not respond by identifying any of these exemptions that would potentially excuse its failure to disclose the information requested by the Plaintiff.

43. W. Va. Code § 29B-1-5 provides the enforcement mechanism for the WVFOIA requirements:

(1) Any person denied the right to inspect the public record of a public body may institute proceedings for injunctive or declaratory relief in the circuit court in the county where the public record is kept.

(2) In any suit filed under subsection one of this section, the court has jurisdiction to enjoin the custodian or public body from withholding records and to order the production of any

records improperly withheld from the person seeking disclosure. The court shall determine the matter de novo and the burden is on the public body to sustain its action [.]

(3) Except as to causes the court considers of greater importance, proceedings arising under subsection one of this section shall be assigned for hearing and trial at the earliest practicable date.

*Id.*

44. The Plaintiff brings the instant case against the WVDOC for injunctive and/or declaratory relief under the WVFOIA to enforce the statute's requirements.

45. The WVFOIA explicitly recognizes the importance that public bodies and their officials abide by its statutory requirements by imposing criminal penalties for noncompliance: "Any custodian of any public records who willfully violates the provisions of this article is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than two hundred dollars nor more than one thousand dollars, or be imprisoned in the county jail for not more than twenty days, or, in the discretion of the court, by both fine and imprisonment." W. Va. Code § 29B-1-6.

### **CONCLUSION**

46. The State of West Virginia violated its legal obligations in the administration of the RISE program. Funds obtained from the federal government were appropriated to RISE specifically for recovery and reconstruction after the disastrous flood of June 2016. The few approved applicants who have actually received these funds experienced inexcusable delay. The majority of approved applicants have not yet received the assigned funds now nearly three years after their homes were destroyed.

47. The West Virginia Department of Commerce has provided either inadequate and/or incomplete explanations for its ineptitude in administering RISE funds. It has compounded its unlawful conduct by violating the West Virginia Freedom of Information Act and blatantly ignoring



the request to provide the public with information regarding the administration of the RISE program.

48. The State of West Virginia and its Department of Commerce should not be able to continue operating under a veil of secrecy without providing legally required information to the public.

### **PRAYER FOR RELIEF**

WHEREFORE, the Plaintiff, Bren J. Pomponio, pursuant to the WVFOIA, prays that this Court:

- (a) declare unlawful the Defendant's refusal to completely disclose the information and records requested;
- (b) issue injunctive relief, enjoining the Defendant from withholding without justification the information and records requested, and ordering production of all information improperly withheld;
- (c) order that all information withheld from disclosure by the Defendant be disclosed;
- (d) award him all the costs and reasonable attorney fees incurred in this action, pursuant to the requirements of W. Va. Code § 29B-1-7;
- (e) schedule this matter for a hearing at the earliest practicable date, pursuant to W. Va. Code § 29B-1-5 (3); and
- (f) grant such other relief as this Court may deem just and proper.

**Respectfully submitted by the Plaintiff,**

**Bren J. Pomponio,**

**By Counsel,**

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